SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 624

THE UNITED STATES, PETITIONER,

VS.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
General traverse	7	3
Argument and submission of case	7	3
Special findings of fact	9	4
Conclusion of law	21	14
Opinion, Howell, J.	21	14
Dissenting opinion, Whitaker, J.	34	24
Note re exhibits	35	25
Judgment	37	25
Clerk's certificate (omitted in printing)	39	
Defendant's Exhibit No. 13—Summary and annual profit and loss statements of the Toronto, Hamilton & Buffalo Navigation Company, 1916 through 1942	40	26
Order allowing certiorari		28

1 In the Court of Claims of the United States

No. 46435

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY, an Ohio Corporation, PLAINTIFF.

vs.

THE UNITED STATES, DEFENDANT

Petition—Filed May 15, 1945

To the Honorable, the Chief Justice and Judges of the Court of Claims of the United States:

The plaintiff, The Toronto, Hamilton and Buffalo Navigation Company, presents this, its petition, for the adjudication of its claim upon implied contract for the payment of just compensation resulting from the requisition and appropriation at Ashtabula, Ohio, on August 20, 1942, by the defendant, represented by the War Shipping Administration, of the Car Ferry "Maitland No. 1," Official No. 214213. To that end plaintiff invokes the jurisdiction conferred upon the Court of Claims by Acts of Congress of March 3, 1887, Chapter 359; of March 3, 1911, Chapter 231; and Section 902(2) and Section 902(d) of the Merchant Marine Act of 1936 (U. S. C. A. Title 28, Section 250, Title 46, Section 1242(a) and Section 1242(d)). Plaintiff respectfully alleges and shows to the Court:

2 1. At all times mentioned herein the plaintiff was, and still is, a corporation organized and existing under the laws of the State of Ohio, having an office at 466 Lexington Avenue, New York 17, New York, and prior to August 20, 1942 was engaged in the business of ferrying railroad cars across Lake Erie to and from the ports of Ashtabula, Ohio, and Port Maitland, Ontario.

The plaintiff further, upon information and belief, alleges:

2. By Executive Order No. 9054, dated February 7, 1942 (7 Federal Register 837), as amended by Executive Order No. 9244, dated September 16, 1942 (7 Federal Register 7327), issued pursuant to the authority of the First War Powers Act approved December 18, 1941 (U. S. C. A. Title 50, Appendix Section 601), there was established a War Shipping Administration under the direction of an Administrator appointed by and responsible to the President. By such Executive Orders the functions, duties and powers conferred by law upon the United States Maritime Commission with respect to the operation, purchase, charter, insurance, repair, maintenance, and requisition of vessels and facilities required for the operation thereof and the issuance of warrants with respect thereto

under the Merchant Marine Act of 1936, as amended (U. S. C. A. Title 46, Chapter 27); the Act of June 6, 1941 (Public Law 101, 77th Congress, U. S. C. A. Title 50, Appendix Sections 1271-1275, inclusive); the Act of July 14, 1941 (Public Law 173, 77th Congress, U. S. C. A. Title 50, Appendix Sections 1281-1286, inclusive); were transferred to such Administrator.

3. On August 20, 1942, the President having on May 27, 1941 proclaimed an unlimited national emergency, the United States of America by said War Shipping Administrator requisitioned, took over and appropriated pursuant to the aforesaid powers the plaintiff's car ferry "Maitland No. 1," Official No. 214213, gross tons
3 2757, net tons 1653, equipped with four single ended Scotch boilers with 175 pound pressure and two triple expansion engines of three cylinders each, developing an indicated horse power of 2500 to drive twin screws and designed for use of coal as fuel, with a steel hull of extra strength and design for ice breaking in the Great Lakes which was divided into seven watertight compartments below a single steel deck, upon which was erected the steel superstructure, and including a Sperry gyro compass, a radio direction finder, a depth sounding device, McNab indicators, electric refrigeration, a fifty person capacity lifeboat and other accessories, fittings, furnishing and equipment. The said car ferry was duly registered and enrolled and appropriate documents showing unconditional ownership of said car ferry in the plaintiff were on or about August 20, 1942 duly furnished to the defendant.

4. The fair value of the car ferry "Maitland No. 1" at the time and place the same was so requisitioned and the just compensation to which the plaintiff is entitled for the taking thereof by the defendant is the sum of $766,128.00.

5. The defendant on April 20, 1943, acting pursuant to the provisions of Section 902 of the Merchant Marine Act of 1936, as amended (U. S. C. A. Title 28, Section 1242(d)) offered to pay to the plaintiff the sum of $72,500.00 as just compensation for, and the fair value of, the car ferry "Maitland No. 1," seized and appropriated by it, as aforesaid, but said offer was rejected by the plaintiff with the request that the defendant pay to the plaintiff, pursuant to the provisions of the Merchant Marine Act, 75 per centum of the amount offered. Thereafter, and on or about June 10, 1944, the defendant paid to the plaintiff the sum of $54,375.00 as part payment for the car ferry "Maitland No. 1," its appurtenances and equipment, without prejudice, however, to the right of the plaintiff to secure to itself the payment of additional
4 compensation as the fair value of, and just compensation for, the seizure, taking and appropriation of the said vessel.

6. The plaintiff is justly entitled to the sum of $711,753.00 from the United States as the fair value of the said vessel and the just compensation payable in consequence of the taking thereof after allowing all just credits and offsets.

7. No action has been taken upon the claim set forth in this petition by Congress or by any of the departments of the Government except as herein stated.

8. Plaintiff is, and at all times mentioned herein has been, the sole, absolute and unconditional owner of the legal title to the claim herein presented. Plaintiff has made no assignment or transfer of said claim or any part thereof or any interest therein.

9. Plaintiff has at all times borne true allegiance to the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government and the plaintiff believes the facts as stated in this petition to be true.

WHEREFORE, the plaintiff prays for judgment against the United States pursuant to law for the sum of $711,753.00, together with such interest and costs as may be allowed by law.

THE TORONTO, HAMILTON AND BUFFALO NAVIGATION COMPANY,
By GUSTAVE H. HOWE,
Treasurer.

FREDERICK L. WHEELER,
Attorney for Plaintiff,
466 Lexington Avenue,
New York 17, New York.

5-6 *Duly sworn to by Gustave H. Howe. Jurat omitted in printing.*

7-8 GENERAL TRAVERSE—Filed June 25, 1945

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed. OK J. F. S.

(S) FRANCIS M. SHEA,
Assistant Attorney General.

ARGUMENT AND SUBMISSION OF CASE

On April 5, 1948, the case was argued and submitted on merits by Mr. Frank J. Mahony for plaintiff, and by Mr. Kendall M. Barnes for defendant.

9 SPECIAL FINDINGS OF FACT, CONCLUSION OF LAW AND OPINION OF THE COURT BY HOWELL, J. DISSENTING OPINION BY WHITAKER, J.—Filed December 6, 1948

Mr. Frank J. Mahony for the plaintiff. *Messrs. Frederick B. Wheeler* and *C. Austin White* were on the brief.

Mr. Kendall M. Barnes, with whom was *Mr. Acting Assistant Attorney General H. G. Morison*, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

SPECIAL FINDINGS OF FACT

1. The plaintiff is a corporation, organized under the laws of the State of Ohio and having an office located in New York, New York. On and prior to August 20, 1942, it was the sole owner of the vessel known as the *Maitland No. 1*.

2. On August 20, 1942, the War Shipping Administration, acting pursuant to the Merchant Marine Act of 1936, as amended (46 U. S. C. 1242) requisitioned title to and possession of the *Maitland No. 1*. Within a short time thereafter, the War Shipping Administration removed the machinery from the vessel and sold the hull to a purchaser who converted it into a barge.

3. On April 20, 1943, the War Shipping Administration fixed the sum of $72,500 as just compensation for, and the fair value of, the *Maitland No. 1* and plaintiff was given prompt notice of this determination.

4. On December 21, 1943, plaintiff notified the defendant that the amount fixed by it as just compensation for the vessel was unsatisfactory to plaintiff and that it had elected to receive
10 75 percent of the amount awarded by the defendant and to reserve its right to sue the United States to recover such further sum as, added to the said 75 percent, would make up an amount that would be just compensation for the vessel. On June 10, 1944, the defendant paid plaintiff the sum of $54,375, being 75 percent of the amount determined by the defendant as just compensation.

5. No sum beyond said $54,375 has been paid to plaintiff by the defendant on account of the requisition of the *Maitland No. 1*. However, on October 4, 1943, the War Shipping Administration paid plaintiff the sum of $302.84, being the value of and just compensation for the consumable stores and expendable equipment aboard the vessel at the time she was requisitioned. The value of such consumable stores and equipment is not in issue in this action.

6. The *Maitland No. 1* was designed and built by the Great Lakes Engineering Works in 1916. It was a car ferry, constructed for the carriage of railway freight cars on the Great Lakes. It was a two masted, two stacker, conventional type, twin-screw vessel with a steel hull. The vessel had an over-all length of 350 feet, a beam of 56 feet, and a moulded depth to the car deck of 20 feet, 6 inches, with a clearance between the car and spar decks of 17 feet, 7 inches. Her gross tonnage was 2,757 tons and she was powered by two triple-expansion reciprocating steam engines, having cylinders 19½ inches, 31 inches, and 52 inches in diameter and with pistons having a 36 inch stroke. She had four Scotch boilers, fired by coal to operate at a maximum steam pressure of 175 pounds.

The vessel was equipped with auxiliary engines, motors and pumps, anchor and anchor chains, windlass, capstans, steering gear, intercommunicating and telegraph systems, mast head, range and search lights, a car headlight and two lifeboats.

There were four railroad tracks on the car deck, having a capacity of 30 freight cars of the size in use in 1916, but of only 26 of the larger sized freight cars in use in 1942.

In addition to quarters for firemen and coal passers on the car deck, the spar deck had 32 separate rooms, including the pilot house, wireless room, captain's office, six officers' staterooms, two staterooms for passengers, 9 rooms for the stewards and
11 crew, an officers' dining room, two mess rooms for the crew, four baths and lavatories, a galley, a pantry, a store room and a refrigerator.

7. The *Maitland No. 1* was constructed for Mr. L. N. Beckley, who was the president of plaintiff. The approximate cost of constructing the vessel was $362,800. This amount was based on the cost records of the builder plus an arbitrary addition for overhead and profit. In August 1916, the plaintiff acquired the *Maitland No. 1* from Mr. Beckley at a cost of $394,560.

8. From 1917 to 1930, plaintiff expended $38,115.46 for additions and betterments to the vessel. These improvements and additions included an enclosed, noncapsizable lifeboat purchased in 1921 at a cost of $6,016.55; the installation of an ice-making machine and the building of three additional rooms on the spar deck in 1926 at a cost of $6,400; a direction and revolution indicator installed in 1927 at a cost of $619.21; a gyrocompass and course recorder purchased in 1927 for $4,449.21; a Haynes sounding machine acquired in 1927 for $6,532.98; improvements to the ballast system in 1927 at a cost of $7,651.10 and a direction finder purchased in 1930 at a cost of $2,000.00.

9. From October 1916 to June 1932, plaintiff operated the *Maitland No. 1* on Lake Erie, between the ports of Ashtabula, Ohio,

and Port Maitland, Canada, a distance of 91 miles. The vessel was capable of making three round trips every two days and carried commodities loaded in freight cars moving between points in the Pittsburgh area, served by the New York Central Railroad, and points in Canada, served by the Toronto, Hamilton and Buffalo Railway Company. The car ferry afforded a short cut from the rail route, which moved around the end of Lake Erie and through the congested Buffalo area. The use of the ferry reduced the length of time the freight cars were in use for carrying the merchandise with which they were loaded.

In 1936 all of the stock of the plaintiff company was acquired by the New York Central and the Toronto, Hamilton and Buffalo Railway Companies.

10. The *Maitland No. 1* was the only vessel owned and operated by the plaintiff on its car ferry line. Plaintiff's chief source of revenue was derived from the transportation of bituminous
12 coal from the Ohio Customs District to Canada and its annual income over the sixteen and one-half year period of operation fluctuated in accordance with the tonnage of coal carried by the car ferry.

From August 12, 1916, to June 30, 1932, plaintiff's annual average net income from the *Maitland No. 1*, after deducting Federal income taxes, amounted to the sum of $36,368.64. This income provided plaintiff with an annual return on its investment of 8.85 percent. However, under standard accounting practices, income taxes are not regarded as operating expenses but as a distribution of earned income. Plaintiff's average annual income during the same period, without deduction for Federal incomes taxes, amounted to $42,816.36. On this basis, plaintiff's average annual income amounted to 10.41 percent of its investment.

Defendant's exhibit No. 13, which is made a part hereof, is a statement of the plaintiff's net operating income, exclusive of Federal income taxes, for each of the years during which the *Maitland No. 1* was operated by plaintiff. For the first four and one-half years (August 12, 1916 to January 1, 1921) the average annual net operating income from the *Maitland No. 1* was $17,216.28. In 1921 and 1922, the car ferry was operated at a net loss. During the next five years (1923 to 1928), the net operating income from the *Maitland No. 1* was at its highest level during the entire period the car ferry was in use, averaging $129,893.92 per annum. Beginning in 1928, the net operating income declined sharply below the 1927 earnings. This downward trend continued in 1929 and the vessel was operated at a net loss in 1930, 1931, and 1932. By June 1932, which was the low point of the financial depression which began in 1929, traffic handled by the *Maitland No. 1* had decreased to

the extent that plaintiff laid up the vessel, and the operation of the car ferry line was never resumed after that date.

11. The sharp decline in plaintiff's net operating income from the *Maitland No. 1* in 1928 and 1929 was contrary to the trend of earnings of Class I railroads in this country during the same period. In 1928 and 1929, the freight revenues of Class I railroads of the United States were in excess of their 1927 revenues.

Also, the exports of bituminous coal from the Ohio Customs
13 District to Canada were greater in 1928 and in 1929 than in 1927.

The reasons for this reduction in revenue, which began in 1928 and resulted in the discontinuance of operations in 1932, were set out in an application which plaintiff filed with the Interstate Commerce Commission on February 11, 1943, for leave to abandon its car ferry line. The application was filed after the defendant had requisitioned the *Maitland No. 1*, and the first reason for abandonment stated in plaintiff's petition, was the fact that the only vessel owned by plaintiff had been requisitioned by the War Shipping Administration. The second ground for abandonment, as stated by plaintiff, was:

> 2. Since June 1932, when the vessel operation ceased, there has been insufficient traffic available to justify the operation. Cross-lake traffic to Canadian rail heads dropped off upon the opening of the new Welland Canal in 1932 because larger vessels could take cargoes directly from Lake Erie to Lake Ontario ports. Traffic handled over the route moves on a slower schedule than if handled all-rail through Buffalo, New York. Identical rates are applicable over the two routes.

In its answer to the questionnaire filed by plaintiff with the Interstate Commerce Commission in connection with the application, the plaintiff also stated as follows:

> 15A. The traffic over the line decreased to such an extent that service was suspended on June 28, 1932. Prior to 1928 the bulk of the traffic handled consisted of bituminous coal for movement to the Steel Company of Canada at Hamilton, Ontario. In August, 1928, this traffic was diverted to Sodus Point, New York, for movement across Lake Ontario to Hamilton. When the new Welland Canal was opened in August, 1932, most of the remaining traffic was lost since vessels formerly unable to navigate the old Canal were enabled to take shipments directly to Lake Ontario points, by-passing Port Maitland without using the facilities of the applicant or its connecting rail line in Canada.

* * * * *

17A. No effort has been made to dispose of the line so as to insure continued operation since traffic is not available in sufficient quantities to warrant continued operation, even if a suitable car ferry were available. The all-rail routes are adequate and convenient.

14 12. On June 30, 1932, the *Maitland No. 1* was laid up at her dock at Ashtabula, Ohio, and was never used thereafter as a car ferry. Plaintiff did not operate the vessel for any purpose after June 30, 1932, but on November 29, 1935, plaintiff chartered her to the Nicholson Universal Steamship Company. The charterer covered the tracks on the vessel with planking and used her for carrying freight across Lake Michigan, between Milwaukee, Wisconsin, and Muskegon, Michigan. It was discovered that this transaction was in violation of Section 27 of the Merchant Marine Act of 1920 (46 U. S. C. 883), which prohibits the transportation of merchandise by water between two ports of the United States in vessels owned by persons who are not citizens of the United States.

In view of that statute, plaintiff and the Nicholson Universal Steamship Company made an agreement by which the title to the *Maitland No. 1* was transferred to the Nicholson Steamship Company on February 10, 1936, for a total consideration of $166,000. In the contract of sale, plaintiff retained the right to "recapture" the vessel within a specified period of time. At the time the sale was made, plaintiff intended to reacquire title to the vessel.

Plaintiff exercised its right of "recapture" on December 15, 1937, on which date the Nicholson Universal Steamship Company transferred title to the vessel to plaintiff for $92,894.80. Thereafter, the *Maitland No. 1* was moored at Ashtabula, Ohio, until it was requisitioned by the defendant.

13. During the eight-year period the *Maitland No. 1* was laid up at Ashtabula, Ohio, before she was requisitioned, the captain and chief engineer remained on board as shipkeepers. One of the boilers was fired up every winter and the engines were turned over periodically. The main and auxiliary engines were kept lubricated, the bright work was greased and minor repairs, of the kind needed to keep the vessel from deteriorating, were made from time to time. The chief engineer was authorized to hire any additional help required for such repair work.

From January 1, 1922 to June 30, 1932, while the *Maitland No. 1* was in use on the ferry line, plaintiff's average annual expenditure for repairs to the vessel was $20,329.11.

15 There is no evidence with respect to the cost of repairs or lay-up expenses for the vessel from June 30, 1932, to December 15, 1937.

From January 1, 1938, to August 20, 1942, the annual lay-up expenses averaged about $2,400 and the average annual cost of repairs was about $300.

14. On August 21, 1942, the day after the *Maitland No. 1* was requisitioned, a representative of the defendant made a condition survey of the vessel and itemized the repairs that were necessary to place her in operating condition. The surveyor's written report of such necessary repairs and the estimated cost thereof was as follows:

Item No.	Description	Cost
54a	Furnish and install 8 new furnaces (2 in each boiler) at $3,000 each	$24,000.00
b	Retube boilers. Cut out 1,124 defective tubes. Furnish and install new tubes. Cost per tube installed $7.50	8,430.00
c	Scaling boilers. After furnaces and tubes are removed, scale remainder of internal surfaces. $50 each	200.00
58	Renew defective bottom sections of front uptake breechings approximately 10' x 2'—12-gauge iron each boiler. $250 each	1,000.00
65	Repair or renew as required broken and defective sections of various sized pipe covering	500.00
66	Pumps—Dismantle feed pumps as required, remove outside plungers to shop true up and replace same	250.00
	Renew defective C. I. bends in ash ejector pipes, furnish necessary labor and material to effect this renewal	500.00
	Engine department total	34,880.00
91	Rebrick, clean out, free dampers, and doors as required	100.00
	Stewards department total	100.00
	Total for vessel	34,980.00

In addition to the work which the surveyor reported to be necessary, some additional minor repairs were needed. These included the installation of a new seagate at the stern, small repairs to the coal bunkers and one of the auxiliary engines, and the removal of the plank flooring laid on the car deck by the Nicholson Universal Steamship Company. The record does not show the total cost of these additional repairs but it would have been a relatively small amount.

15. Plaintiff depreciated the value of the *Maitland No. 1* on its books from October 1, 1916, to December 31, 1919, at the rate of one percent per annum and thereafter at the annual rate of four percent. On the date of the requisition, the book value of the vessel, as shown on plaintiff's records, was $75,509.51.

16 16. From January 1, 1938, to August 20, 1942, plaintiff maintained insurance on the *Maitland No. 1* based on a valuation of $100,000.

17. At the time she was requisitioned, the use to which the *Maitland No. 1* was best adapted was as a car ferry on the Great Lakes.

At that time, however, there was no demand for the vessel as a car ferry on Lake Erie and there is no satisfactory proof that there was any demand for her for use as a car ferry elsewhere on the Great Lakes.

Prior to 1936, the Pere Marquette Railway Company, which later became the Pere Marquette District of the Chesapeake and Ohio Railway Company, had a number of car ferries similar to the *Maitland No. 1*, operating on Lake Michigan and one in use on Lake Erie. Until about 1930, these car ferries held a competitive advantage over the all-rail transportation of loaded freight cars moving from western points to New York and Canada. Freight cars transported on the all-rail routes had to move through the Chicago yards where the congestion was so great that the freight cars were frequently delayed for long periods of time. In addition, freight rates on the car ferry lines were lower than on the all-rail routes. Sometime between 1928 and 1930, the railroads completed the construction of "an outer belt" railroad around the City of Chicago and this enabled them to avoid the long delays previously experienced in the Chicago yards. About the same time, the rate differential in favor of the car ferry lines was abolished. There were also changes in traffic on the ferry lines, which required more clearance between the car decks and the cabin decks of the vessels. As a result of these changed conditions, the ferry lines were no longer able to compete successfully with the all-rail routes and vessels of the *Maitland No. 1* type became obsolete for further use as car ferries on the Great Lakes. By 1936 the majority of these outmoded car ferries had been laid up and were replaced by larger vessels, having greater speed to permit faster and more regular operation and provided with more clearance between the decks so as to accommodate larger loads. The new vessels were capable of carrying a larger number of freight cars and had additional facilities for carrying passengers in order to provide a new source of revenue for the operators.

17 18. Although there was no demand in 1942 for the *Maitland No. 1* for use as a car ferry on the Great Lakes, there were a number of secondary uses for the vessel for which a demand did exist at that time.

In 1942, the *Maitland No. 1* could have been adapted for use as a highway ferry, for transporting automobiles and passengers on the Great Lakes or similar bodies of fresh water involving no greater length of haul. The vessel could have been converted for that purpose more economically and more quickly than for any other use, since the principal change that would have been required was the placing of an asphalt cover over the rails on the car deck to accommodate automobiles.

Between 1936 and 1940, several car ferries similar to the *Maitland No. 1* were sold to purchasers who converted them to highway ferries.

In 1938, the Pere Marquette Railway Company sold the car ferry, *Pere Marquette No. 20*, which had been built in 1903 from the same plans as the *Maitland No. 1*, to the Michigan Highway Department. The sale price was $50,000, plus an additional $10,000 for delivering the vessel across Lake Michigan to a shipyard.

In 1940 the Pere Marquette Railway Company sold the car ferry, *Pere Marquette No. 17*, which had been built in 1901 to the same plans as the *Maitland No. 1*, to the Michigan Highway Department for $65,000.

In 1936, the Ann Arbor Railroad sold the car ferry *Ann Arbor No. 4* to the Michigan Highway Department for $25,000. This vessel was smaller than the *Maitland No. 1*, being only 250 feet in length as compared with the 350-foot length of the *Maitland No. 1*.

19. Although the *Pere Marquette Nos. 17 and 20* were comparable to the *Maitland No. 1* in size, carrying capacity, speed and design, they were older vessels and on the dates they were sold, were in a much poorer state of repair than was the *Maitland No. 1* on the date of the requisition.

The *Pere Marquette No. 20* was laid up in September, 1930, and nothing was expended on her for maintenance or repairs between that time and the date of sale. In 1936, the owners made a survey of the vessel and estimated that it would cost $173,700 to
18 place her in operating condition for use as a car ferry for a period of five years. After it acquired the vessel, the Michigan Highway Department expended $215,000 for repairing and remodeling her for use as a highway ferry.

The *Pere Marquette No. 17* had likewise been laid up for a number of years prior to her sale. In 1936 the owners estimated that an expenditure of $147,200 would have been required to place the vessel in operating condition as a car ferry for a period of five years. A total of $534,000 was expended by the Michigan Highway Department for remodeling and reconditioning this vessel.

There is no proof with respect to the age or condition of the *Ann Arbor No. 4* at the time the vessel was sold in 1936.

20. In some instances, Great Lakes car ferries have been sold and converted to ocean-going car ferries, which operate between Texas City, Texas, and New York, between New Orleans and Havana, Cuba, and between Florida and Cuba. The cost of moving the Great Lakes vessels to the coast and altering them for use in salt water is substantial, and it has not been economically feasible to use them on the long routes from Texas to New York or between New Orleans and Cuba. For such long hauls, they cannot

compete successfully with the Sea Trains which can carry about four times as many freight cars.

However, such converted vessels have proven satisfactory for car ferry service between Florida and Cuba. In 1942, there was a demand for a vessel such as the *Maitland No. 1* for use as a car ferry between Florida and Cuba.

Shortly after the cessation of hostilities in World War II, the Grand Trunk Railway Company sold the *Grand Haven*, a car ferry formerly operated on the Great Lakes, to the West Indies Fruit and Steamship Company for $50,000. At considerable expense, the amount of which is not shown in the record, the vessel was floated down the Mississippi River and converted for use as a ferry between Florida and Cuba. The *Grand Haven* was built in 1903; she was a smaller vessel than the *Maitland No. 1* but had more speed and power. There is no evidence regarding the condition of this vessel at the time of sale.

In May 1941, the Florida East Coast Railroad Company sold the *Henry M. Flagler*, a car ferry which had operated between
19 Florida and Cuba, to Hans Isbrantsen of New York for $100,000. The purchaser owned a line of freighters but was not a car ferry operator. Apparently, he bought the vessel as an investment.

The *Flagler* was built in 1914 from substantially the same plans as the *Maitland No. 1*. The principal difference between the vessels was that the *Flagler* was equipped to operate in and had been used in salt water. As in the case of the *Maitland No. 1*, the *Flagler* had had been laid up for ten years prior to the sale. Between 1936 and 1941, the total expended for repairs or maintenance on this vessel was only $15,679, but between May 1941 and July 28, 1941, the purchaser, Mr. Isbrantsen, expended the sum of $63,820 for necessary repairs on the *Flagler*. On July 28, 1941, the War Shipping Administration requisitioned this vessel and appraised her value at $170,000, which the owner accepted as compensation for the taking.

In June 1942, the War Shipping Administration requisitioned two ocean-going car ferries which were owned by the Florida East Coast Railroad Company and had been operated by that company between Florida and Cuba. These vessels were the *Joseph R. Parrott* and the *Estrada Palma*. By negotiation between the parties, a value of $665,000 for both vessels, of $332,500 for each, was agreed upon, and the Florida East Coast Railroad Company accepted that sum in full payment of the vessels. Except for the fact that these car ferries were equipped to operate in salt water, whereas the *Maitland No. 1* was not, the *Joseph R. Parrott* and the *Estrada Palma* were comparable in age, size dimensions, engines, power, boilers, auxiliaries, and type of construction to the *Maitland No. 1*. The *Joseph*

R. Parrott was built in 1916 and the *Estrada Palma* in 1920; both vessels were in service at the time they were requisitioned. Between 1936 and 1941, the owners expended $128,144 for maintenance and repairs to the *Joseph R. Parrott*, but the record does not reflect the amount spent on the *Estrada Palma* for repairs during that period of time. The Government had condition surveys made of both vessels, and the surveyors found that the estimated amounts required to repair them on or about the date they were requisitioned was $23,595 for the *Joseph R. Parrott* and $19,430 for the *Estrada Palma*.

20 The normal useful life of a car ferry operated on the Great Lakes is fifty years, whereas such a car ferry operated in salt water has a normal useful life of only forty years.

On the Atlantic Coast, the market price of vessels increased between 1941 and 1942 because of the greater demand for vessels which occurred after the beginning of World War II. The estimated amount of this increase that would have been applicable had the *Maitland No. 1* been sold in 1942 for the purpose described above, is the sum of $11,420.

At the time of the requisition, it would have cost not less than $115,000 to move the *Maitland No. 1* to the Atlantic Coast and fit her for operation in salt water. In addition, some strengthening of the framing would probably have been required before the vessel could be classified for ocean-going service. There is no evidence as to how much these additional changes would have cost.

21. In 1940 and 1942, two vessels which had become obsolete for further use as car ferries, were sold to purchasers, who removed the engines from the boilers, tore off the superstructure of the vessels and used them as bulk carriers of pulpwood.

In July, 1940, the Pere Marquette Railway Company sold the *Pere Marquette No. 19* to John Roen of Sturgeon Bay, Wisconsin, for $24,000. The vessel was built to the same plans as the *Maitland No. 1* and was a sister ship of the *Pere Marquette No. 20*, which was referred to in finding 18. She had been laid up for a number of years, and just prior to the sale, the owners estimated that an expenditure of $308,000 would be required to recondition her for an additional fifteen or twenty years' operations.

In March 1942, the *Marquette and Bessemer No. 2* was sold to the Filer Fiber Company for $37,724.04. The vessel, which had been built in 1910 from the same plans as the *Maitland No. 1*, was jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Railway Company and had formerly been used as a car ferry on Lake Erie. She had been retired from service as a car ferry in 1931 and received no maintenance or repairs thereafter. In 1936 the vessel was towed to Cleveland, where she was used during 1936 and 1937 as a cabaret in connection

with the Cleveland Exposition. The operators of the night
21 club removed her bulwark plates, tore out the cabins and stripped her of most of her readily removable parts and equipment. Prior to the sale, the owners estimated that by expending $300,000 for repairs, the vessel could be placed in condition to operate for fifteen or twenty additional years.

After the expiration of its useful life, or after it has become obsolete, a car ferry has a residual value for scrap steel. The scrap value of the *Maitland No. 1* in August 1942 was $13,500.

22. The fair value of the *Maitland No. 1* at the time of the requisition was $161,833.72.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover $107,458.72 with interest.

It is therefore ordered and adjudged that plaintiff recover of and from the United States the sum of one hundred seven thousand four hundred fifty-eight dollars and seventy-two cents ($107,458.72), with interest thereon at the rate of 4 percent per annum from June 10, 1944, to date of payment. To this sum should be added compensation measured by interest at 4 percent per annum for delay in payment on $161,833.72 from August 20, 1942, to June 10, 1944.

OPINION

HOWELL, *Judge*, delivered the opinion of the Court:

This is an action to recover just compensation, pursuant to the Fifth Amendment to the Constitution, for the Great Lakes car ferry *Maitland No. 1*, requisitioned by the War Shipping Administration of the United States on August 20, 1942.

The only question presented in this case relates to the value of the *Maitland No. 1*. Plaintiff contends that its value is somewhere between a minimum of $332,500 and a maximum of $458,689.89, while it is the defendant's position that the value does not exceed $72,500. The Commissioner of the Court reported a value of $182,-
900. The difference between the various figures results en-
22 tirely from differences in the elements considered in computing the value of the vessel and the weight to be given to those various elements.

This vessel was requisitioned pursuant to Section 902 of the Merchant Marine Act of 1936, as amended. Subdivisions (a) and (d) of this section, which are the only ones here pertinent, read as follows:

> (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President,

it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

* * * * *

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U. S. C. 1934 edition, title 28, secs. 41, 250).

23 The *Maitland No. 1* was designed and built by the Great Lakes Engineering Works in 1916. It was a conventional, steel hull, two masted, two stacker, twin screw, car ferry with extra weight of steel to make it suitable for winter ice-breaking operation. The vessel was 350 feet in length, 56 feet beam, 20 feet 6 inches molded depth to the car deck, with a clearance between the car and the spar decks of 17 feet 7 inches. Its gross tonnage was 2,757 tons and it was powered by two triple expansion reciprocating engines driven by four Scotch boilers, fired by coal under a forced draft to operate at a maximum pressure of 175 pounds. The hold was divided into eight compartments housing the engines, boilers, steering engine, coal bunkers, ballast and shaft alley. The coal bunkers had a capacity of 332 net tons. Four railroad tracks were installed on the car

deck and they had a capacity of 30 box cars of the short conventiona size weighing loaded, 70 tons, or 26 cars of the larger, modern type.

The *Maitland No. 1* was constructed for Mr. L. N. Beckley, who was the president of plaintiff. The approximate cost of constructing the vessel was $362,800. In August 1916 the plaintiff acquired the *Maitland No. 1* from Mr. Beckley at a cost of $394,560, a mark-up of about 8.75 percent over cost of construction.

From 1917 to 1930 plaintiff expended $38,115.46 for equipment and betterments to the vessel.

From October 1916 to June 1932, plaintiff operated the *Maitland No. 1* on Lake Erie, between the ports of Ashtabula, Ohio, and Port Maitland, Canada, a distance of 91 miles. The vessel was capable of making three round trips every two days, and carried commodities loaded in freight cars moving between points in the Pittsburgh area, served by the New York Central Railroad, and points in Canada, served by the Toronto, Hamilton and Buffalo Railway Company. From the date of its organization to about February 10, 1936, all of plaintiff's capital stock was owned by the latter company, a subsidiary of the New York Central Railroad. On or about the latter date, the Toronto, Hamilton and Buffalo Railway Company distributed plaintiff's stock to its stockholders, the New York Central and the Canadian Pacific.

The *Maitland No. 1* was the only vessel owned and operated by plaintiff on its car ferry line. Plaintiff's chief source of revenue was derived from the transportation of bituminous coal to Canada, and its annual income over the sixteen and one-half year period of operation fluctuated with the tonnage of coal carried by the car ferry. For the first four and one-half years (August 12, 1916, to January 1, 1921), the average annual net operating income from the *Maitland No. 1* was $17,216.28. In 1921 and 1922 the car ferry was operated at a net loss, the average loss for the two years being $14,461.90. During the next five years (1923 to 1927, inclusive), the net operating income from the *Maitland No. 1* was at its highest level during the entire period the car ferry was in use, averaging $129,893.92 per annum. Beginning in 1928, the net operating income declined sharply below the 1927 earnings. This downward trend continued in 1929, the average net income for the two years being $22,950.42. The vessel was operated at a net loss in 1930, 1931 and the first six months of 1932, the average annual loss being $15,417.82. For the entire period from August 12, 1916, to June 30, 1932, plaintiff's annual average net income from the *Maitland No. 1*, before Federal income taxes, was $42,816.36. This amounted to 10.41 percent of plaintiff's investment.

24

The sharp decline in plaintiff's net operating income in 1928 and 1929 was contrary to the trend of earnings of Class I railroads in this country during the same period. In 1928 and 1929 the freight

revenues of Class I railroads of the United States were in excess of their 1927 revenues. Also, the exports of bituminous coal from the Ohio Customs District to Canada were greater in 1928 and 1929 than in 1927.

The reasons for this reduction in revenue, which began in 1928 and ultimately resulted in the discontinuance of operations in 1932, were set out in an application which plaintiff filed with the Interstate Commerce Commission on February 11, 1943, for leave to abandon its car ferry line. This application was filed after the defendant had requisitioned the *Maitland No. 1*, and the first reason stated for abandonment was that the only vessel owned by plaintiff had been requisitioned by the War Shipping Administration. The second ground for abandonment, as stated by plaintiff in this petition, was:

> 25 Since June 1932, when the vessel operation ceased there has been insufficient traffic available to justify the operation. Cross-lake traffic to Canadian rail heads dropped off upon the opening of the new Welland Canal in 1932 because larger vessels could take cargoes directly from Lake Erie to Lake Ontario ports. Traffic handled over the route moves on a slower schedule than if handled all-rail through Buffalo, New York. Identical rates are applicable over the two routes.

In its Reply to Questionnaire filed with the Interstate Commerce Commission in the same proceeding, plaintiff expanded on this matter, stating:

> 15A. The traffic over the line decreased to such an extent that service was suspended on June 28, 1932. Prior to 1928 the bulk of the traffic handled consisted of bituminous coal for movement to the Steel Company of Canada at Hamilton, Ontario. In August 1928, this traffic was diverted to Sodus Point, New York, for movement across Lake Ontario to Hamilton. When the new Welland Canal was opened in August 1932, most of the remaining traffic was lost since vessels formerly unable to navigate the old Canal were enabled to take shipments directly to Lake Ontario points, by-passing Port Maitland without using the facilities of the applicant or its connecting rail line in Canada.
>
> * * * * *
>
> 17A. No effort has been made to dispose of the line so as to insure continued operation since traffic is not available in sufficient quantities to warrant continued operation, even if a suitable car ferry were available. The all-rail routes are adequate and convenient.

As noted above, the *Maitland No. 1* was laid up at her dock at Ashtabula, Ohio, on June 30, 1932. After that date it was never operated by plaintiff, and was never operated as a car ferry. On November 29, 1935, plaintiff did charter the *Maitland No. 1* to Nicholson Universal Steamship Company, which covered the tracks on the car deck with planking and used the vessel to carry freight across Lake Michigan, between Milwaukee, Wisconsin, and Muskegon, Michigan. However, it was discovered that this operation was in violation of Section 27 of the Merchant Marine Act of 1920 (46 U. S. C. 883), which prohibits the transportation of merchandise by water between two ports of the United States in vessels owned by persons who are not citizens of the United States. To
26 avoid the effect of this statute, plaintiff made an agreement with Nicholson Universal Steamship Company whereby title to the *Maitland No. 1* was transferred to Nicholson on February 10, 1936, for a total consideration of $166,000. In the contract of sale plaintiff retained the right to recapture the vessel within a specified time, and exercised this right on December 15, 1937, reacquiring title for $92,894.80.

During the succeeding period, the vessel was moored at her dock in Ashtabula, Ohio, with either the Chief Engineer or Captain on board as shipkeeper, during which time steam was maintained in the boilers, the engines were turned over periodically, maintainence work was performed, and extra help was employed when necessary. Some minor repair work was done at an average annual expenditure during the period from January 1, 1938, to August 20, 1942, of about $300.

On August 20, 1942, the War Shipping Administration requisitioned title to and possession of the *Maitland No. 1*. On the following day a representative of War Shipping Administration made a condition survey of the vessel and itemized the repairs that were necessary to place her in operating condition. He estimated a total expenditure of $34,980, involving principally the replacement of the furnaces which heated the boilers and the retubing of the boilers. In addition to the items listed by him, the vessel required some additional minor repairs.

Shortly after the requisition the War Shipping Administration removed the machinery from the vessel and sold the hull to a purchaser who converted it into a barge.

On April 20, 1943, the War Shipping Administration fixed the sum of $72,500 as just compensation for, and the fair value of, the *Maitland No. 1*. Plaintiff was given prompt notice of this determination. On December 21, 1943, plaintiff notified the defendant that the amount fixed by it as just compensation was unsatisfactory to plaintiff, and that it elected to exercise its statutory right to receive 75 percent of the award without prejudice to its right to sue for

additional compensation. On June 10, 1944, defendant paid plaintiff the sum of $54,375, being 75 percent of the War Shipping Administration's determination of just compensation.

27 In considering the question of the value of the *Maitland No. 1*, it is first essential to understand the background against which such value must be determined. The first point to consider in this connection is that, although the use to which the *Maitland No. 1*, was best adapted at the time of the requisition was as a car ferry on the Great Lakes, there was no demand for her for such use. The reason for this lack of demand requires a brief consideration of the entire history of car ferry operation on the Great Lakes.

Most operation of car ferries on the Great Lakes has centered on Lake Michigan and the Detroit River. The only car ferries which have ever operated elsewhere on the Great Lakes, so far as the present record discloses, are the *Maitland No. 1*, the *Ashtabula*, owned by the Pennsylvania Railroad, and the *Marquette and Bessemer No. 2*, jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Railway Company, all three of which operated across Lake Erie from Ohio to Canada. As noted above, lack of traffic and its diversion to other routes had caused plaintiff to take the *Maitland No. 1* out of service in the middle of 1932. The Pennsylvania Railroad continued the operation of its car ferry, since it did not control a rail route into Canada, as did the New York Central. Neither in 1942 nor at any time subsequent thereto has the Pennsylvania Railroad required an additional car ferry to handle its traffic. The *Marquette and Bessemer No. 2*, referred to above, had been laid up in 1931, was not operated thereafter, and was sold in March 1942 for $37,724.04.

With the exception of car ferries operated across the Detroit River, where an entirely different type of boat was used under different traffic conditions, the balance of the car ferries on the Great Lakes operated across Lake Michigan chiefly between points in Michigan and in Wisconsin. Until about 1930 these car ferries held a competitive advantage over the all-rail transportation of loaded freight cars moving from western points to New York and Canada. Freight cars transported on the all-rail routes had to move through the Chicago yards, where the congestion was so great that freight cars were frequently delayed for long periods of time. In addition, freight rates on the car ferry lines were lower than on the all-rail routes.

28 Sometime between 1928 and 1930 the railroads completed the construction of the "outer belt" railroad around the city of Chicago, and thus enabled through freight shipments to avoid the delays previously experienced in the Chicago yards. About the same time the rate differential in favor of the car ferry lines was abolished. There were also changes in the nature of the

traffic carried by the car ferry lines, which required greater clearanc between the car decks and the cabin decks of the vessels to permi open-type freight cars to be loaded with maximum loads.

As a result of these changed conditions, the car ferry lines wer no longer able to compete successfully with the all-rail routes, at leas so long as they were operating vessels of the type of the *Maitland No. 1*. For that reason, this type of vessel became obsolete for fur- ther use as car ferries on the Great Lakes. By 1932 the majority o these outmoded car ferries had been laid up and were replaced by larger vessels, having greater speed to permit faster and more regula operation (including operation on a twelve months' basis, as con- trasted with the winter layup which the *Maitland No. 1* had always had), and provided with more clearance between the decks so as to accommodate larger loads. The new vessels were also capable of carrying a larger number of freight cars, and had additional facili- ties for carrying passengers (and, if space were available, their auto- mobiles), in order to provide a new source of revenue for the opera- tors.

Between 1936 and 1940, several car ferries resembling the *Mait- land No. 1* were sold to purchasers who converted them to highway ferries.

In 1938, the Pere Marquette Railway Company sold the car ferry, *Pere Marquette No. 20*, which had been built in 1903 from the same plans as the *Maitland No. 1*, to the Michigan Highway Department. The sale price was $50,000, plus an additional $10,000 for delivering the vessel across Lake Michigan to a shipyard.

In 1940 the Pere Marquette Railway Company sold the car ferry, *Pere Marquette No. 17*, which had been built in 1901 to the same plans as the *Maitland No. 1*, to the Michigan Highway De- partment for $65,000.

Although the *Pere Marquette Nos. 17 and 20* were comparable to the *Maitland No. 1* in size, carrying capacity, speed and
29 design, they were older vessels and on the dates they were sold, were in a much poorer state of repair than was the *Maitland No. 1* on the date of the requisition.

In some instances, Great Lakes car ferries have been sold and con- verted to ocean-going car ferries, which operate between Texas City, Texas, and New York, between New Orleans and Havana, Cuba, and between Florida and Cuba. The cost of moving the Great Lakes vessels to the coast and altering them for use in salt water is substantial and it has not been economically feasible to use them on the long routes from Texas to New York, or between New Orleans and Cuba. For such long hauls, they cannot compete suc- cessfully with the Sea Trains which can carry about four times as many freight cars.

However, such converted vessels have proven satisfactory for car ferry service between Florida and Cuba. In 1942, there was a de-

mand for a vessel such at the *Maitland No. 1* for use as a car ferry between Florida and Cuba.

The United States in June 1942 had appropriated two ferries from the Florida East Coast Car Ferry Company, one, the *Joseph R. Parrott*, and the other, the *Estrada Palma*, for which the parties by open negotiation and agreement, without litigation, fixed a value of $665,000.00 for both, or $332,500.00 for each.

An analysis provides a startling comparison of the equality of the vessels in type, construction, machinery and condition.

Vessel	*Joseph R. Parrott*	*Estrada Palma*	*Maitland No. 1*
Date of survey	5/31/1942	6/19-21/1942	8/21/1942.
Year built	1916	1920	1916.
Gross tons	2,406	2,639	2,757.
Net tons	1,114	1,340	1,653.
Propelling machinery.	Twin screw triple expansion.	Twin screw triple expansion.	Twin screw triple expansion.
Boilers	4 Scotch forced draft.	4 Scotch forced draft.	4 Scotch forced draft.
Sale price	$332,500.00	$332,500.00	?
Cost to place in operating condition.	$23,595.00	$19,430.00	$34,980.00.
Sound condition value	$356,095.00	$351,930.00	?.

The acquisition of the *Joseph R. Parrott* and the *Estrada Palma* provide contemporaneous transactions in vessels of great similarity to the *Maitland*. As a means of establishing value by the market value method, the values fixed for the *Joseph R. Parrott* and
30 the *Estrada Palma* should furnish close equivalents.

The principal difference between the vessels was that the latter two were equipped to operate in and had been used in salt water, whereas the evidence shows that in August 1942 it would have cost approximately $115,000 to move the *Maitland No. 1* to the Atlantic Coast and fit her for operation in salt water.

The normal useful life of a car ferry operated on the Great Lakes is fifty years, whereas such a car ferry operated in salt water has a normal useful life of only forty years.

Even after the normal life for its primary use as a car ferry has ended, such a vessel has a residual value for a secondary use, such as a highway ferry, bulk carrier, a marine auxiliary for a wrecker, a marine dormitory, a bulkhead, a night club, or as scrap steel.

In 1940 and 1942, two vessels which had become obsolete for further use as car ferries were sold to purchasers, who removed the engines from the boilers, tore off the superstructure of the vessels and used them as bulk carriers of pulpwood.

In July 1940, the Pere Marquette Railway Company sold the *Pere Marquette No. 19* to John Roen of Sturgeon Bay, Wisconsin, for $24,000. The vessel was built to the same plans as the *Maitland No. 1* and was a sister ship of the *Pere Marquette No. 20* which was referred to above. She had been laid up for a number of years, and just prior to the sale, the owners estimated that an expenditure of

$308,000 would be required to recondition her for an additional fifteen or twenty years' operations.

In March 1942, the *Marquette and Bessemer No. 2* was sold to the Filer Fiber Company for $37,724.04. The vessel, which had been built in 1910 from the same plans as the *Maitland No. 1*, was jointly owned by the Marquette and Bessemer Dock and Navigation Company and the Pere Marquette Railway Company and had formerly been used as a car ferry on Lake Erie. She had been retired from service as a car ferry in 1931 and received no maintenance or repairs thereafter. In 1936 the vessel was towed to Cleveland,
where she was used during 1936 and 1937 as a cabaret in
31 connection with the Cleveland Exposition. The operators of the night club removed her bulwark plates, tore out the cabins and stripped her of most of her readily removable parts and equipment. Prior to the sale, the owners estimated that by expending $300,000 for repairs, the vessel could be placed in condition to operate for fifteen or twenty additional years.

The general rule is that market value at the time and place of taking is just compensation for condemned property (*United States* v. *New River Collieries*, 262 U. S. 341, 344; *United States* v. *Miller*, 317 U. S. 369, 374; *United States* v. *Powelson*, 319 U. S. 266, 275). Every isolated sale of property, however, does not thereby create or establish a market in such property for the purpose of ascertaining market value. If the property taken "be an article commonly traded in on a market and it is shown that at the time and place it was taken there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition" (*United States* v. *New River Collieries, supra*, p. 345). "So evidence of prices current among dealers in commodities which are the subject of frequent sales would be proper to show value" (*Sharp* v. *United States*, 191 U. S. 341, 349-350). The transactions relied upon, however, to establish a market value should be numerous and the quantities sold should be extensive in order that a proper criteria of market price be obtained (*United States* v. *New River Collieries, supra*, p. 345).

Where, as in this case, the property condemned is unique, or of a special type or character, or so peculiarly situated, that there is no evidence of proper sales by which to establish value, or, where there may be evidence of dealings in similar property, but the transactions have been few and infrequent, or they may have been of such a character, or so remote in time, that they do not meet the test of numerous sales in significant quantities as required by law, then resort must be had to other methods and other evidence to establish the value of the property taken (*United States* v. *Miller, supra*, 374; *Washington Water Power Co.* v. *United States*, 135 F. (2d) 541, 542).

32 Sometimes "the value of property generally speaking is determined by its productiveness—the profits which its use brings to the owner. Various elements enter into this matter of value. * * * value, therefore, is not determined by the mere cost of construction, but more by what a completed structure brings in the way of earnings to its owner" (*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 328). "Among the factors to be taken into consideration is such an amount as when capitalized at a certain percentage will produce yearly the revenue which plaintiff has lost * * *" (*Willow River Power Co., Inc.* v. *United States*, 101 C. Cls. 222, 230).

In this case there are several unusual factors which render it difficult to apply the ordinary methods in determining a fair compensatory value at the time of the taking of the *Maitland No. 1*. We have found that the vessel was best adapted at the time of requisition as a car ferry on the Great Lakes, though there was no demand for her for such use. Furthermore, we have before us the fact that the *Maitland No. 1* was laid up at her dock on June 30, 1932. Later the vessel was used for a short time to carry freight across Lake Michigan, which can be termed as a profitable use which might have been continued had this operation not been in violation of the Merchant Marine Act of 1920, *supra*. Obviously, the vessel had a value in excess of the residual value of an obsolete car ferry even though it was not in actual operation in 1942.

In view of all these circumstances, we are compelled to resort to a consideration of the earnings of the *Maitland No. 1* during the time that the vessel was actually operated as a car ferry, in conjunction with the contemporaneous transactions in vessels of close similarity in determining a fair value.

The proof in this case shows that the average annual net profit for the 16-year period that the vessel was operated, before income taxes, amounted to $42,816.36, a return on investment of 10.41 percent per annum.

The testimony further disclosed that the *Maitland No. 1* had a residual value solely as scrap in 1942 of approximately $13,500,
33 and that at the time of the trial such scrap value varied between $64,000 and $100,100. The sale prices of the several obsolete car ferries represent their residual values for secondary uses and those prices ranged between a low of $24,000 paid for the *Pere Marquette No. 19*, to a high of $65,000 paid for the *Pere Marquette No. 17*.

The average mean residual value of an obsolete car ferry can be taken at $50,000. Attributing this value to the *Maitland No. 1*, the capitalized value of an annual income of $42,816.36 for a period of 24 years at an annual rate of 10 percent per annum amounts to $389,767.15, according to actuarial tables in evidence.

This figure approximates the amount paid by defendant to Florida East Coast Car Ferry Company for the car ferries *Joseph R. Parrott* and *Estrada Palma*, both of which vessels had been operating along the Atlantic Coast and consequently were equipped to operate in salt water. The *Maitland No. 1*, however, was not equipped to operate in nor had it been used in salt water. As a matter of fact, it had been operated only in fresh water involving no great length of haul. The evidence discloses that the normal useful life of a car ferry operated in salt water in only 80 percent of such a ferry operated in fresh water, the comparison being 40 and 50 years respectively. The remaining useful life of the *Maitland No. 1* operated in salt water would be reduced by 20 percent, which in turn would be reflected in its value at the time of taking. Consequently, from the value of $389,767.15 there must be deducted $77,953.43.

A survey of the *Maitland No. 1* made at the time of its requisition, which defendant stipulated reflected its true condition, indicated that an expenditure of $34,980 would place the vessel in sound operable condition. From the sum of $311,813.72 this figure must be deducted.

As pointed out above, in August 1942 it would have cost approximately $115,000 to move the *Maitland No. 1* to the Atlantic Coast and fit her for operation in salt water. Therefore, from the sum of $276,833.72 there must be deducted the amount of $115,000.

With these considerations in mind, we therefore find that the fair value of the *Maitland No. 1* for its highest available and most profitable use for which it was adaptable at the time of its taking
34 is $161,833.72. (*Olson* v. *United States*, 292 U. S. 246, 255; *Cameron Development Co.* v. *United States*, 145 F. (2d) 209, 210; *Washington Water Power Co.* v. *United States*, *supra*, 543.)

Against this amount the defendant is entitled to credit for the sum of $54,375 paid on June 10, 1944.

Plaintiff is also entitled to recover compensation measured by interest at 4 percent per annum for delay in payment on $161,833.72 from August 20, 1942, to June 10, 1944, and on $107,458.72 from June 10, 1944, to date of payment.

It is so ordered.

LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

WHITAKER, *Judge*, dissenting:

I am unable to agree with the judgment of the court.

The amount is arrived at by taking the average earnings of the vessel from 1916 to 1932 and capitalising them at 10 percent, and then deducting therefrom the difference in its remaining useful life when used in salt water and in fresh water, and also the cost of reconditioning it, and the cost of transporting it to the Florida east coast. This is an improper basis, I think, because at the time of its requisition it was earning nothing and had earned nothing for quite a long time. Had it been requisitioned during its earning period

its earnings would have been a proper matter to take into consideration, but I do not think this is proper where it was requisitioned long after its earning power had ceased.

Nor do I think the price at which comparable vessels sold on the Florida east coast is a proper basis for determining just compensation, because it presupposes that the owner of this vessel on the Great Lakes would have been able to sell his vessel after he had transported it down there, and there is no showing whatever it would have been able to do so. I feel quite sure that plaintiff would not have gone to the expense of $115,000 to transport the vessel to the Florida east coast in the hope of finding a purchaser there. Just compensation is to be determined not only as of the time of the taking but also as of the place of taking. *United States* v. *New River Collieries*, 262 U. S. 341; *United States* v. *Miller*, 317 U. S. 369; *United States* v. *Powelson*, 319 U. S. 266, cited in majority opinion.

35-36 The majority opinion shows that the sale price on the Great Lakes of similar vessels, which had likewise become obsolete for the use for which they had been originally constructed, ranged from $24,000 to $65,000. The War Shipping Administration fixed $72,500 as just compensation. I do not think the plaintiff has carried the burden of showing that this was incorrect. If plaintiff had undertaken to dispose of its vessel on the Great Lakes it seems improbable that it could have secured any greater sum.

Judge MADDEN concurs in the foregoing opinion.

NOTE RE EXHIBITS

Defendant's Exhibit No. 13, made a part of the findings herein by reference, accompanies this record under separate cover.

37-38 JUDGEMENT OF THE COURT—December 6, 1948

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover.

IT IS THEREFORE ORDERED AND ADJUDGED that plaintiff recover of and from the United States the sum of one hundred seven thousand four hundred fifty-eight dollars and seventy-two cents ($107,458.72), with interest thereon at the rate of 4 percent per annum from June 10, 1944, to date of payment. To this sum should be added compensation measured by interest at 4 percent per annum for delay in payment on $161,833.72 from August 20, 1942, to June 10, 1944.

39 Clerk's Certificate to foregoing transcript omitted in printing.

40 DEFENDANT'S EXHIBIT No. 13

Averages computed for
Period 8/12/1916 to 12/31/1920=4.389 years.
Period 1923 to 1927, incl.=5 years.

From (*Deft's Ex. 13*)

		Annual average
(a) *Net operating Income:*		
8/12/1916 to Dec. 31, 1920	=$ 75,562.24	=$ 17,216.28
	4.389 yrs.	
Jan. 1, 1923 to Dec. 31, 1927	=$649,469.59	=$129,893.92
	5 years	
(b) *Net Income:*		
Aug. 12, 1916—Dec. 31, 1920	=$ 73,234.09	=$ 16,685.83
	4.389 yrs.	
Jan. 1, 1923 to Dec. 31, 1927	=$696,383.81	=$139,276.76
	5 years	

Period	Revenue	
	Charter Revenue	Freight Revenue
8/12/16–12/31/16	$10,505.16	$25,283.06
1917		149,641.87
1918		164,116.40
1919		164,830.82
1920		217,286.29
1921		164,277.00
1922		133,342.26
1923		347,620.33
1924		254,276.00
1925		282,923.78
1926		307,639.19
1927		332,328.28
1928		205,517.96
1929		201,442.78
1930		164,856.79
1931		127,951.24
1/1/32–6/30/32		28,547.37
Total	$10,505.16	$3,271,881.42
7/1/32–12/31/32		
1933		
1934		
1935	3,506.13	
1936	2,900.00	
1937		
1938		
1939		
1940		
1941		
1942		
Total	$16,911.29	$3,271,881.42

DEFENDANTS EXHIBIT 13

Toronto, Hamilton, & Buffalo Navigation Company

Summary, Annual Profit & Loss Statements 1916 through 1942

(Exclusive of Federal Income Taxes as an Expense Item)

Period	Revenue			Expenses			Net Operating Revenue	Taxes other tha on Inco
	Charter Revenue	Freight Revenue	Total	Operating Expenses	Depreciation	Total		
8/12/16–12/31/16	$10,505.16	$25,283.06	$35,788.22	$28,166.04	$986.91	$29,152.95	$6,635.27	$—0—
1917		149,641.87	149,641.87	132,350.50	3,947.64	136,298.14	13,343.73	1,253.
1918		164,116.40	164,116.40	138,448.96	3,947.64	142,396.60	21,719.80	1,686.
1919		164,830.82	164,830.82	150,025.02	3,947.64	153,972.66	10,858.16	1,764.
1920		217,286.29	217,286.29	171,235.06	15,929.68	187,164.74	30,121.55	2,412.
1921		164,277.00	164,277.00	161,780.86	15,929.64	177,710.50	(13,433.50)	2,292.
1922		133,342.26	133,342.26	132,662.20	16,170.36	148,832.56	(15,490.30)	2,313.
1923		347,620.33	347,620.33	151,974.12	16,170.36	168,144.48	179,475.85	2,523.
1924		254,276.00	254,276.00	152,641.15	16,170.36	168,811.51	85,464.49	2,475.
1925		282,923.78	282,923.78	147,776.59	16,170.36	163,946.95	118,976.83	1,946.
1926		307,639.19	307,639.19	155,724.85	16,298.34	172,023.19	135,616.00	2,662.
1927		332,328.28	332,328.28	169,716.03	16,426.32	186,142.35	146,185.93	6,641.
1928		205,517.96	205,517.96	163,315.70	17,115.76	180,431.46	25,086.50	6,641.
1929		201,442.78	201,442.78	163,370.44	17,257.99	180,628.43	20,814.35	5,696.
1930		164,856.79	164,856.79	148,379.36	17,311.32	165,690.68	(833.89)	4,559.
1931		127,951.24	127,951.24	125,132.65	17,337.96	142,470.61	(14,519.37)	1,502.
1/1/32–6/30/32		28,547.37	28,547.37	43,069.69	8,668.98	51,738.67	(23,191.30)	750.
Total	$10,505.16	$3,271,881.42	$3,282,386.58	$2,335,769.22	$219,787.26	$2,555,556.48	$726,830.10	$47,120.
7/1/32–12/31/32								
1933								
1934								
1935	3,506.13		3,506.13	753.88	1,444.83	2,198.71	1,307.42	95
1936	2,900.00		2,900.00	8,103.90	932.15	9,036.05	(6,136.05)	—0—
1937								
1938								
1939								
1940								
1941								
1942								
Total	$16,911.29	$3,271,881.42	$3,288,792.71	$2,344,627.00	$222,164.24	$2,566,791.24	$722,001.47	$47,21

Schedule

( ) denotes red figures.

DEFENDANTS EXHIBIT 13

Toronto, Hamilton, & Buffalo Navigation Company

Summary, Annual Profit & Loss Statements 1916 through 1942

(Exclusive of Federal Income Taxes as an Expense Item)

Total	Expenses			Net Operating Revenue	Taxes other than on Income	Net Operating Income	Other Income	Other Expenses	Net Income
	Operating Expenses	Depreciation	Total						
,788.22	$28,166.04	$986.91	$29,152.95	$6,635.27	$—0—	$6,635.27		$301.64	$6,333.63
,641.87	132,350.50	3,947.64	136,298.14	13,343.73	1,253.40	12,090.33		1,252.64	10,837.69
,116.40	138,448.96	3,947.64	142,396.60	21,719.80	1,686.11	20,033.69		450.00	19,583.69
,830.82	150,025.02	3,947.64	153,972.66	10,858.16	1,764.54	9,093.62		313.87	8,779.75
,286.29	171,235.06	15,929.66	187,164.74	30,121.55	2,412.22	27,709.33		10.00	27,699.33
,277.00	161,780.86	15,929.64	177,710.50	(13,433.50)	2,292.16	(15,725.66)	$740.60	2,110.68	(17,095.74)
,342.26	132,662.20	16,170.36	148,832.56	(15,490.30)	2,313.06	(17,803.36)	100.66		(17,702.70)
,620.33	151,974.12	16,170.36	168,144.48	179,475.85	2,523.64	176,952.21	373.84		177,326.05
,276.00	152,641.15	16,170.36	168,811.51	85,464.49	2,475.70	82,988.79	1,714.06		84,702.85
,923.78	147,776.59	16,170.36	163,946.95	118,976.83	1,946.30	117,030.53	13,594.13		130,624.66
,639.19	155,724.85	16,298.34	172,023.19	135,616.00	2,662.17	132,953.83	15,080.82		148,034.65
,328.28	169,716.03	16,426.32	186,142.35	146,185.93	6,641.70	139,544.23	16,151.37		155,695.60
,517.96	163,315.70	17,115.76	180,431.46	25,086.50	6,641.70	18,444.80	16,146.70		34,591.50
,442.78	163,370.44	17,257.99	180,628.43	20,814.35	5,696.26	15,118.09	18,396.50		33,514.59
,856.79	148,379.36	17,311.32	165,690.68	(833.89)	4,559.00	(5,392.89)	17,429.34		12,036.45
,951.24	125,132.65	17,337.96	142,470.61	(14,519.37)	1,502.08	(16,021.45)	7,222.95		(8,798.50)
,547.37	43,069.69	8,668.98	51,738.67	(23,191.30)	750.00	(23,941.30)	1,648.64		(22,292.66)
,386.58	$2,335,769.22	$219,787.26	$2,555,556.48	$726,830.10	$47,120.04	$679,710.06	$108,599.61	$4,438.83	$783,870.84
						—0—	5,745.86	16,408.17	(10,662.31)
						—0—	9,762.25	24,035.25	(14,273.00)
						—0—	10,144.97	24,564.12	(14,419.15)
,506.13	753.88	1,444.83	2,198.71	1,307.42	95.00	1,212.42	5,984.05	17,662.67	(10,466.20)
,900.00	8,103.90	932.15	9,036.05	(6,136.05)	—0—	(6,136.05)	20,279.22	8,754.80	5,388.37
						—0—	4,813.31	2,364.96	2,448.35
						—0—	693.05	8,907.61	(8,214.56)
						—0—	1,248.00	8,696.72	(7,448.72)
						—0—	1,275.97	8,392.35	(7,116.38)
						—0—	1,436.50	7,984.96	(6,548.46)
						—0—	1,514.88	8,881.10	(7,366.22)
,792.71	$2,344,627.00	$222,164.24	$2,566,791.24	$722,001.47	$47,215.04	$674,786.43	$171,497.67	$141,091.54	$705,192.56

( ) denotes red figures.

Schedule VI

☆ U. S. GOVERNMENT PRINTING OFFICE: 1939 619983 488

Supreme Court of the United States

Order allowing certiorari

Filed May 2, 1949

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ. The case in transferred to the summary docket.

U. S. GOVERNMENT PRINTING OFFICE: 1949